(3) 96-358

Supreme Court, U.S.
FILED
NOV 8 1996

In The Supreme Court Of The United States

OCTOBER TERM, 1996

NORFOLK AND WESTERN RAILWAY COMPANY,

Petitioner,

v.

JAMES L. CHUTTUM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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35 pp

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QUESTION PRESENTED

SHOULD A RAILROAD WHOSE NEGLIGENCE HAS CAUSED A PERMANENT, CAREER-ENDING INJURY TO AN EMPLOYEE BE PERMITTED TO REDUCE ITS FINANCIAL RESPONSIBILITY TO THAT EMPLOYEE BY DEDUCTING THE EMPLOYEE'S RAILROAD RETIREMENT PAYMENT TOWARD HIS RETIREMENT FROM THE EMPLOYEE'S GROSS INCOME TO DETERMINE HIS ECONOMIC LOSS?

PARTIES TO THE PROCEEDING

The only parties to this proceeding are Norfolk and Western Railway Company and James L. Chittum, generally known as Lynwood Chittum.

Norfolk and Western Railway Company is a Virginia corporation with its principal place of business in Norfolk, Virginia. Norfolk and Western Railway Company is a subsidiary of Norfolk Southern Railway Company, which is a subsidiary of Norfolk Southern Corporation.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

No. 96-358

NORFOLK AND WESTERN RAILWAY COMPANY,

Petitioner,

v.

JAMES L. CHITTUM,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

BRIEF IN OPPOSITION

This case involves a fairly simple, personal injury claim brought pursuant to the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* In the trial court, the jury returned its verdict in favor of James L. Chittum, and the judgment was affirmed on appeal.

Chittum was a welder, employed by Norfolk and Western, in Roanoke, Virginia. He sustained a career-ending injury while working on the "spike pile" in the Roadway Materials Yard. At the conclusion of the trial, the jury found in Chittum's favor on the fundamental issues of negligence, causation and foreseeability, and the judgment was affirmed by the Supreme Court of Virginia.

The only issue involved here is whether Norfolk and Western is going to be permitted to extend this Court's decision in *Norfolk and Western Ry. v. Liepelt*, 444 U.S. 490 (1980). The Railroad claims that *Liepelt* requires the admission of evidence of the employee's Tier I and Tier II payments toward his retirement for purposes of determining his economic loss. In context, the issue raised by Norfolk and Western involves only Chittum and the rest of the 213,000 employees currently engaged in the freight railroad industry.

Although the case necessarily involves a question of federal law because the claim arises under the Federal Employers' Liability Act, there is no conflict among federal circuit or state supreme courts; the decision of the Supreme Court of Virginia does not conflict with any precedent of this Court; and the case certainly does not present an important issue of federal law with significant practical consequences.

OPINION BELOW

The decision of the Supreme Court of Virginia, dated April 19, 1996, affirming the judgment of the Circuit Court of the City of Roanoke, which the Petitioner seeks to review, is reported at 251 Va. 408, 458 S.E.2d 877 (1996). The Supreme Court of Virginia denied rehearing on June 7, 1996, and that order is unreported. The decision and order are included in the Appendix to the Petition for a Writ of Certiorari.

JURISDICTION

Jurisdiction in the state trial court below, a court of general jurisdiction, was based on 45 U.S.C. § 51 *et seq*. The court exercised its concurrent jurisdiction over Chittum's federal claim. Jurisdiction in the Supreme Court of Virginia was based on § 8.01-670 of the Code of Virginia of 1950, as amended. The Petition for Writ of Certiorari was filed in the Court on or about September 8, 1996. The Petitioner seeks review, under 28 U.S.C. § 1257 and Rule 10(c) of the Rules of the Supreme Court of the United States, of the Virginia Supreme Court's Order denying further review.

STATUTE INVOLVED

The Federal Employers' Liability Act, 45 U.S.C. § 51, provides, in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States...shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of . . . such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

STATEMENT OF THE CASE

Lynwood Chittum filed this action against Norfolk and Western under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, to recover damages after he sustained a career-ending injury as a result of the Railroad's failure to provide him with a safe place to work. As it did in the trial court and on appeal to the Supreme Court of Virginia, Norfolk and Western has given itself a more favorable version of the facts than is justified by the jury verdict or by the record.

Chittum began working for Norfolk and Western in 1973, in the Engineering Department, doing hard physical labor. He was shot in a hunting accident in late 1973, and he remained paraplegic for some time.

With hard work and years of rehabilitation, Chittum was able to return to work in 1978, without any medical restrictions. He had some residual physical limitations, including a loss of sensation in his right foot. With the aid of metal foot and ankle supports attached to his shoes, Chittum worked regularly, although he walked with a limp.

In 1981, because of the neurological condition, Chittum did not feel a nail that came through the heel of his right boot. He discovered it at the end of the day when he took off the boot. Chittum went to a reconstructive surgeon who performed a split thickness skin graft at the site of the wound in his right heel. By January, 1982, Norfolk and Western's physician again authorized Chittum to return to work without restrictions. He worked at various jobs in Norfolk and Western's Engineering Department until June, 1991, when he was taken out of service by the Railroad's physician after the skin graft tore open and began bleeding.

Between 1982 and 1989, when he tore the skin graft for the first time, Chittum saw several doctors, including Norfolk and Western's physician, for various reasons, generally related to the residuals of the 1973 gunshot wound, and the resulting neurological problems. In 1989, Chittum tore the skin graft slightly when he twisted his right foot and ankle on some railroad spikes in Norfolk and Western's Roadway Materials Yard. His job at the time involved burning

open metal spike kegs that had been dumped in the "spike pile", with a blow torch and dumping the spikes on the ground, so they could be picked up and salvaged for use on other jobs. Chittum treated the initial tear himself, but in April, 1990, he returned to the surgeon because of shooting pains in his foot. The doctor determined that the problem was neurologic, rather than related to the condition of the skin graft, but he prescribed an arch support to help take the weight of Chittum's body off the site of the skin graft.

Chittum did well until April, 1991, when he tore the graft open again while he was working on the spike pile. Chittum was not able to take care of this tear as the reconstructive surgeon had taught him, so in early June, 1991, he returned to the physician. At that point, the graft was sufficiently damaged that the surgeon concluded Chittum needed another surgical repair. The surgeon did not tell him to stop working, so Chittum continued working for two weeks until he tore the wound open, again while working on the "spike pile," and it began bleeding for the first time. At that time, he was taken to the Railroad's physician who ordered him taken out of service. Chittum has not returned to work since then, and it is undisputed that he is not physically qualified to return to his regular railroad employment.

At the time of his injury, Chittum had slightly more than 120 months of credited railroad service, and because of the disability he will never acquire the 360

months of service required for a normal age and service pension from the United States Railroad Retirement Board.

The liability issue was hotly contested in the trial court and on appeal. Norfolk and Western claimed Chittum was working elsewhere during the time he tore the skin graft for the first time, and it vigorously challenged the sufficiency of Chittum's evidence on the issues involving negligence, causation and foreseeability, as well as the issue raised in Norfolk and Western's Petition.

During the trial, in order to calculate Chittum's net economic loss, Norfolk and Western proposed to deduct from his gross income, in addition to federal and state income taxes, the Railroad Retirement payments which Chittum himself made toward his retirement. On Chittum's objection, the trial court limited the Railroad's proof on the issue to federal and state income taxes, as contemplated by this Court's holding in *Norfolk and Western Ry. v. Liepelt*, 444 U.S. 490 (1980). The Railroad was not permitted to offer evidence that Chittum's gross wages would have been reduced by an additional 12.55% for payments mandated by the Railroad Retirement Tax Act, 26 U.S.C. § 3201.[1]

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[1]At the same time, the trial court did not permit Chittum to offer evidence of Norfolk and Western's RRTA payments, which

(continued...)

The trial court's decision on the issue was upheld by the Supreme Court of Virginia, which indicated that this Court "has never held that Tier I and Tier II payments toward retirement are to be treated the same as federal and state income taxes and, therefore, deducted to establish net income." 251 Va. at 416. The Supreme Court of Virginia did "not equate them [Tier I and Tier II payments] with income taxes."

REASONS FOR DENYING THE PETITION

Contrary to the assertions of Norfolk and Western's Petition, there is no compelling reason to grant a writ; nor is there any significant policy or social reason for the relief sought. On the contrary, the case involves nothing more than a defendant's effort to reduce its financial responsibility to an injured plaintiff, a question of damages in a personal injury case, even though the case does arise under the Federal Employers' Liability Act. There are no conflicting decisions from any of the eleven federal circuit courts which require resolution; there are no conflicting

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[1](...continued)
amount to 23.75% of an employee's gross wages, over the balance of his expected work life. The Railroad does not make these payments when the employee does not work, and this fact necessarily diminishes the amount of the pension Chittum would have received upon a normal age and service retirement from railroad service.

decisions from any of the various federal district courts which require resolution; and there are no conflicting decisions from the highest courts of any of the fifty states which require resolution.

Norfolk and Western's Petition misinterprets the holdings of several decisions in formulating its argument, and its reference to several cases based on other federal statutes which involve workers' compensation plans looks like an effort to compare elephants and frogs.

The reference to statistics on pages 7 and 8 of the Petition show how insignificant this case really is in the overall picture of the business of this Court. According to the statistics given, the 213,000 employees in freight railroad industry comprise less than one-tenth of one percent of the population of the United States, and of that number, less than three percent filed FELA suits in the year cited. There is no way to know how many of these cases involve occupational hearing loss and asbestos claims which generally do not involve lost time or lost wages.

When the decision of the Supreme Court of Virginia is evaluated in light of these considerations, it is clear that Norfolk and Western's Petition should be denied.

I.

THE DECISION OF THE SUPREME COURT OF VIRGINIA DOES NOT CONFLICT WITH ANY FELA DECISION OF THIS COURT OR THE DECISION OF THE APPELLATE COURT OF ILLINOIS

Contrary to the assertions of the Petition, this Court's opinion in *Norfolk and Western Ry. v. Liepelt*, 444 U.S. 490 (1980) does not require that an injured railroader's Tier I and Tier II payments toward his retirement be deducted from his gross income for the purpose of determining his economic loss. It is certainly true that questions concerning the measure of damages in cases brought pursuant to the Federal Employers' Liability Act are federal in character and, therefore, are governed by federal law. *Monessen Southwestern Railway v. Morgan*, 486 U.S. 330 (1988), *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485 (1916), *Michigan Central R.R. v. Vreeland*, 227 U.S. 59 (1913). However, not one decision from this Court or any of the federal circuit courts has ever held that in an FELA case, an injured employee's own railroad retirement payments should be deducted from his gross income.

Although N&W cites *Norfolk & Western Ry. v. Liepelt, supra*, as authority for its position, the decision does not provide the authority N&W claims. In *Liepelt*, the issues were "(1) whether it was error to

exclude evidence of the income taxes payable on . . . past and estimated future earnings; and (2) whether it was error . . . to refuse to instruct the jury that the award of damages would not be subject to income taxation." *Ibid* at 491. This Court held that a railroad is entitled to introduce evidence of the income taxes payable on past and estimated future lost earnings, and that it was error to refuse the requested instruction that the damage award was not subject to income taxes.

Shortly after *Liepelt*, this Court noted that its holding that an FELA defendant is entitled to have juries instructed that damage awards are not subject to income tax "articulated a federal common-law rule." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 (1981). The explanation that "[t]he purpose was to eliminate from the deliberations of juries 'an area of doubt or speculation that might have an improper impact on the computation of the amount of damages,'" 453 U.S. at 487, makes it perfectly clear the reasoning was to avoid the danger that juries would increase their verdicts sufficiently "so that plaintiff would get what they think he deserves after the imaginary tax is taken out of it." 444 U.S. at 497.

From the argument in its Petition, it is clear that Norfolk and Western has simply misinterpreted this Court's decision in *Liepelt*. *Liepelt* was a wrongful death case, and in that case, the measure of damages was and is limited to "the damages [that] flow from the deprivation of the pecuniary benefits which the

beneficiaries might have reasonably received if the deceased had not died from his injuries." *Michigan Central R.R. v. Vreeland*, 227 U.S. at 70. In a wrongful death case under the FELA, there can be no recovery for the beneficiary's loss of love and affection, mental anguish or loss of society and companionship.

According to the evidence in *Liepelt*, the beneficiary's pecuniary loss, to the expected date of the decedent's retirement, when reduced to present value at the time of trial was approximately $302,000.00, but the verdict was $775,000.00. There was nothing in the opinion in *Liepelt* to indicate any impact on the amount of the decedent's expected pension from the date of his expected retirement through the remainder of his life expectancy. On the basis of the opinion in *Liepelt*, however, Norfolk and Western has suggested that the measure of damages for an injured employee, such as Lynwood Chittum, is limited to pecuniary loss, and that is simply wrong. Norfolk and Western has concluded that "a disabled employee injured by the employer's negligence is entitled to lost wages." Petition, p.5. The Railroad goes on to claim that this Court "has repeatedly articulated the principle that an injured plaintiff . . . is entitled to recover compensation for 'the damages . . . [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received.'" Petition, p.8. In the context of someone like Lynwood Chittum who has sustained a disabling, career-ending

injury, but who is still alive, the premise is simply wrong, even though it would be correct if he had been killed.

An employee like Lynwood Chittum who has been rendered disabled as a result of the Railroad's negligence is entitled to recover for past and future lost wages and fringe benefits, reduced to present value, pain and suffering and any diminution of retirement benefits caused by the injury. *See Boston & Maine R. R. v. Talbert*, 360 F.2d 286 (1st Cir. 1966).

The difference in the measure of damages for a personal injury case as opposed to a wrongful death case has apparently led to Norfolk and Western's confusion on the issue, as a brief analysis of *Liepelt* will demonstrate. In *Liepelt*, N&W argued that "the jury must have assumed that its award was subject to federal income taxation," 444 U.S. at 492, because the verdict exceeded the decedent's projected total economic loss, when discounted to present value, by more than two and one-half times. In the context of a wrongful death case where the measure of damages is limited to pecuniary loss as described in *Michigan Central R. R. v. Vreeland*, *supra*, and where the amount of the verdict cannot exceed the pecuniary loss, the argument makes sense. However, in the context of a disabling injury, the argument ignores several important elements of damages.

In the context of a wrongful death case, the holding in *Liepelt* is understandable, because we all pay federal and state income taxes to support our fair share of the cost of government. The decedent in *Liepelt* would have paid those income taxes had he not been killed. He would have received the same benefit from the payment of those income taxes as any other taxpayer, including a railroad employee who was rendered permanently disabled as a result of his employer's negligence.

In the case of a railroad employee like Lynwood Chittum, who was medically disabled and unable to return to work at his regular occupation because of his employer's negligence, the implications are significant. Chittum acknowledges that he would have had to pay federal and state income taxes from his railroad income had he not been injured. He does not acknowledge, however, that Norfolk and Western is, or should be, entitled to benefit from his inability to make further payments toward his pension.

The Railroad Retirement Act of 1974, 45 U.S.C. § 231b indicates that the amount of a railroad pension is directly related to the employee's highest sixty months of compensated service and the employee's total credited railroad service. Railroaders are eligible for a normal age and service pension when they reach age 62 and accrue 360 months of credited railroad service, but the average age of retirement is sixty-three (63) years. When he last worked, in 1991,

Lynwood Chittum was 37 years old, and he had only slightly more than ten years of credited railroad service. He would not have been eligible for a normal age and service pension for another twenty-five years, but because of the disability, he will never accrue the 360 months necessary for a normal retirement pension. Because of the effect of two different national contracts that have been implemented since Chittum went out of service, there have been or will be several incremental pay increases totalling 24 percent of the basic pay rate from July, 1991, through July, 1999. It is reasonable to expect that Chittum would have benefitted from these and similar pay increases over the twenty-five years he would have been required to work, had he not been injured, before he would have been eligible for a retirement pension. Had he been able to continue working until normal retirement, he would necessarily have been eligible for a significantly larger retirement annuity.

Because of his disability, Chittum will never receive a single additional month of credited railroad service to increase the amount of the disability annuity he now receives, and he will never get the benefit of the pay increases that have become effective since he has been unable to work, to increase the amount of his pension. Under the circumstances, deducting the Tier I and Tier II contributions which Chittum, as an employee, made toward his railroad retirement pension will effectively increase his economic loss.

Although Norfolk and Western has claimed that the decision of the Supreme Court of Virginia "squarely conflicts" with *Oltersdorf v. Chesapeake & Ohio Ry.*, 404 N.E.2d 320 (Ill. App. 1980), cert. denied 450 U.S. 920 (1981), an examination of the opinion does not support the Railroad's contention. The defendant offered to prove a net future economic loss which included the consideration of railroad retirement taxes among other things, 404 N.E.2d at 324, but the trial court refused a proposed jury instruction that was essentially the same as that considered by this Court in *Norfolk and Western Ry. v. Liepelt*, *supra*. The Appellate Court of Illinois noted that in *Liepelt*, this Court "held that 'the wage earner's income tax is a relevant factor in calculating the monetary loss suffered . . .'" 404 N.E.2d at 325. The court went on to hold that "the trial court erred in refusing to allow evidence of the impact of taxation on plaintiff's lost future earnings . . . , " *id.* and for refusing to grant the proposed instruction which related only to "income" taxes. There is certainly nothing in the opinion which indicates a railroad is entitled to subtract railroad retirement payments by the employee in order to determine the employee's past and future economic loss.

At the time of the *Liepelt* decision, the Railroad Retirement Tax Act, 26 U.S.C. § 3201 *et seq.*, with its two-tiered provisions for funding the retirement pensions of railroaders, had been in effect for years. The Tier I and Tier II payments were, and had been,

regular payroll deductions, along with income taxes, but there is nothing in *Liepelt* to suggest that the Tier I and Tier II payments should have been treated like income taxes. The decision in *Liepelt* was limited to the issue of income taxes, and since *Liepelt*, this Court has never expanded its holding to include a worker's Tier I and Tier II payments as N&W now requests. In this respect, it is noteworthy that in several cases decided since *Liepelt*, *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983),[2] *St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. 409 (1985) and *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330 (1988), this Court considered issues that involve damages in FELA cases but did nothing to extend its holding in *Liepelt*, even though the opportunity appears to have been present. In fact, there does not appear to be any published opinion in an FELA case which holds that a railroad is entitled to offer evidence of an employee's Tier I and Tier II contributions toward his retirement in order to reduce the employee's past or future economic loss, or that a railroad is entitled to a jury instruction that an award of damages would not be subject to the employee's Tier I and Tier II payments toward retirement.

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[2]This case was brought under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, but the treatment of reducing future economic loss to present value has been generally applied to FELA cases. *Chesapeake & Ohio Ry. v. Kelly*, *supra*.

It is significant that no federal or state court has held that an injured railroader's Tier I and Tier II payments toward his retirement should be deducted from gross income to determine economic loss. The fact is that none of the cases cited by N&W in its argument on the issue support the Railroad's position. However, the Supreme Court of Virginia is not alone in holding that railroad retirement taxes are not the same as federal and state income taxes. The precise issue was before the Court of Appeals of Georgia in *CSX Transportation, Inc. v. Levant*, 200 Ga. App. 856, 410 S.E.2d 299 (1991), *rev'd on other grounds*, 262 Ga. 313, 417 S.E.2d 320(1992). In discussing the issue, the Court of Appeals stated:

> The taxes paid by plaintiff into the railroad retirement fund are to fund his future retirement and are paid directly to him upon his retirement. Since the railroad retirement taxes would ultimately be paid directly to plaintiff upon his retirement, we find no error with the trial court's refusal to instruct the jury that plaintiff's net income means gross income minus all taxes including railroad retirement taxes.

Recently in *Maylie v. National Railroad Passenger Corp.*, 791 F. Supp. 477 (E.D. Pa. 1992), *aff'd.* 983 F.2d 1051 (3d Cir. 1992), the District Court concluded that "no deduction would be allowed from

plaintiff's gross income for railroad retirement taxes." 477 F. Supp. at 487. In support of its argument, Amtrak cited *Rachal v. Ingram Corp.*, 795 F.2d 1210 (5th Cir. 1986) and *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475 (5th Cir. 1984), but the court rejected the argument with the following comment:

> The value that the jury placed on plaintiff's lost future wages and benefits, therefore, did not include the value of his lost railroad retirement pension. It would be inappropriate to deduct from plaintiff's lost salary taxes that, in effect, represented plaintiff's contribution toward a pension without including, as an item of damages, the value of that pension. Because defendant did not consent to inclusion of the value of the pension as an item of damages, it was not error to refuse to reduce plaintiff's lost wages by the amounts he would have had to pay in railroad retirement taxes.

Another case cited by Norfolk & Western, *Marynik v. Burlington Northern, Inc.*, 317 N.W.2d 347 (Minn. 1982), likewise dealt with the issue of a *Liepelt* instruction. The instruction was granted in this case, so the Railroad's comments about *Marynik* are not relevant to the issue here.

The decisions in these cases are all consistent with the decision of the Supreme Court of Virginia in *Norfolk and Western v. Chittum*, and there is no valid reason for treating this case differently, particularly since there are no FELA decisions supporting the Railroad's position.

Since *Liepelt*, this Court has neither extended nor otherwise changed the applicable law on the matter of discount to present value and related damage issues, including appropriate deductions from gross income to determine economic loss. The holding in *Liepelt*, as subsequently developed in *Pfeifer, Dickerson* and *Monessen Southwestern Ry.*, is still the law. This Court has never held that Tier I and Tier II payments toward an injured railroader's retirement are to be treated the same as federal and state income taxes and deducted from gross income to establish the injured worker's net economic loss. There is simply no authority for N&W's position or its reliance on *Liepelt* and other cases to justify its position that it should have been permitted to offer evidence of Chittum's Tier I and Tier II payments toward his retirement or otherwise reduce his economic loss by those payments. The decision of the trial court on this issue was correct and there is no basis to now extend *Liepelt* beyond the plain language of the opinion.

II.

THE DECISION OF THE SUPREME COURT OF VIRGINIA IS NOT INCONSISTENT WITH ANY DECISION OF ANY FEDERAL COURT DECISION IN A NEGLIGENCE OR TORT STATUTORY SCHEME WITH RESPECT TO THE DEDUCTION OF SOCIAL SECURITY TAXES FOR PURPOSES OF DETERMINING ECONOMIC LOSS

In the absence of any decision from this Court, or any of the federal circuit or district courts, indicating that in an FELA case, a defendant railroad is entitled to deduct the employee's Tier I and Tier II RRTA contributions from gross income, Norfolk and Western has suggested that several decisions involving Social Security taxes under other federal statutes compel the same handling in an FELA case.

It is true that several decisions from the United States Court of Appeals for the Fifth Circuit have held that Social Security taxes should be deducted from gross income in cases under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* and one case under the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.* The problem is that these statutes are not really analogous in the context of this or any other FELA case involving a disabling, career-ending case. The LHWCA is a workmen's compensation statute which has a totally different basis

for compensating an injured worker than the FELA. For a worker covered by LHWCA who has a permanent impairment, his compensation is payable "during the continuance of such total disability", 33 U.S.C. § 908(a) or "during the continuance of such impairment." 33 U.S.C. § 908(c)(23). Because this compensation continues through his entire lifetime, there is no reason to be concerned about subtracting Social Security taxes. The compensation award will take the place of the injured worker's Social Security pension. Similarly, in the case of a death claim under LHWCA, the compensation payments continue "during widowhood, or dependent widowerhood." 33 U.S.C. § 909(b). Again, the compensation award continues in effect and takes the place of the Social Security pension.

With respect to the comparison to the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.*, the analogy is likewise inappropriate. Apart from the maritime nature of the statute, the measure of damages in DOHSA cases is limited to pecuniary loss, as are wrongful death cases, as discussed in *Norfolk & Western Ry. v. Liepelt, supra.* See 46 U.S.C. App. § 762. DOHSA cases are simply not analogous to permanent impairment or disability cases under the FELA.

In support of its position, N&W has cited several decisions, including *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475 (5th Cir. 1984) and *Rachal*

v. Ingram Corp., 795 F.2d 1210 (5th Cir. 1986), which it suggests compel the conclusion that an employee's Tier I and Tier II payments should be deducted from gross income to determine economic loss. However, an examination of these decisions and the authorities upon which they are based, as well as other case law, demonstrates that these cases are not as authoritative as N&W suggests.

Madore is part of a series of decisions by the United States Court of Appeals for the Fifth Circuit that deal with such issues as future economic loss, gross and net wages and discount to present value. *Rachal* is a Jones Act case from the Court of Appeals for the Fifth Circuit, and except for the final sentence, it deals primarily with the right to a jury trial. In the last sentence, the Court stated: "Finally, the district court properly subtracted FICA taxes under *Madore v. Ingram Tank Ships, Inc.* . . . " 795 F.2d at 1218.

In *Madore*, the Court of Appeals referred to *Liepelt* and its own decision in *Culver v. Slater Boat Co.* 688 F.2d 280 (5th Cir. 1982) *[Culver I]* as authority for its position that "the lost income stream must be computed after deducting the income taxes and Social Security taxes the worker would have paid had he continued to work." *Madore, supra* at 479. In *Culver I*, the Court of Appeals' reference to the deductibility of Social Security taxes was made only in the context of a hypothetical situation related to the primary issue of discounting future economic loss to

present value. 688 F.2d at 302. By the time of the *Madore* decision, though, the Court of Appeals had withdrawn the applicable part of *Culver I* by its decision in *Culver v. Slater Boat Co.*, 722 F.2d 114, 123 (5th Cir. 1983) *[Culver II]*. *Culver I* applied only to cases tried after September 22, 1982 and before December 22, 1983. 732 F.2d at 477.

After the Court of Appeals' decision in *Culver II*, the authority on which *Madore* was based was withdrawn, and there have been no other decisions which have suggested that *Madore* has any applicability beyond the date of *Culver II*. Significantly, *Culver II* made no suggestion that Social Security taxes should be deducted from gross income in the determination of an injured worker's economic loss, when it specifically withdrew the portion of *Culver I* which contained the hypothetical referencing to Social Security taxes, and on which *Madore* was based. 722 F.2d at 123. The Court of Appeals for the Fifth Circuit has never resurrected *Culver I*.

With respect to the decision in *Rachel v. Consolidated Rail Corp.*, 891 F. Supp. 428 (N.D. Ohio 1995), to which Norfolk and Western has referred, the authority cited was the already undermined opinion in *Madore*, *supra*. It is equally significant that in *Rachel* the issue was not whether Tier I and Tier II payments should be deducted from gross income to determine economic loss. The issue in *Rachel* was whether the Tier I and Tier II payments

were a fringe benefit which an injured worker was entitled to claim as a lost fringe benefit for which the Railroad was responsible. 891 F. Supp. at 430. The district court declined to permit the worker's economist to testify that the Tier I and Tier II payments of both parties constituted a fringe benefit for which the plaintiff should be compensated. Clearly, *Rachel* does not support the position suggested by N&W here.

It is significant that Norfolk and Western has made no reference to the Federal Tort Claims Act, 28 U.S.C. § 2674, a statute that is more analogous to the Federal Employers' Liability Act than the compensation statutes cited by the Railroad. According to the FTCA, damages against the United States are determined by state law "in the same manner and to the same extent as a private individual under like circumstances . . . . " except that the United States cannot be held liable for prejudgment interest or punitive damages. See *Flannery v. United States*, 718 F.2d 108 (4th Cir. 1983). Predictably, *Flannery* held that "federal income taxes must be deducted in computing lost future earnings . . . ," 718 F.2d at 111, because those taxes were considered punitive in nature, because the plaintiff would have had to pay these taxes had he not sustained the injury. However, there was no suggestion that Social Security taxes be deducted as well. *Flannery* arose in West Virginia, and under West Virginia law, there is no deduction from gross income in determining an injured plaintiff's economic loss. *Flannery v. United States*, 297 S.E.2d 433

(W.Va. 1982). Clearly, *Flannery* would have been the perfect place for holding that Social Security taxes should be deducted from gross income in cases under the Federal Tort Claims Act, had the Court of Appeals for the Fourth Circuit deemed it appropriate.

Applying the FTCA rule to Virginia, an injured person's federal and state income taxes would clearly be deducted from his or her gross income loss, but Social Security taxes would not be deductible. In *Hoge, Admir. v. Anderson*, 200 Va. 364, 106 S.E.2d 121 (1958), the Supreme Court of Virginia indicated that in computing damages, the appropriate figure was "gross earnings" rather than "net or 'take home pay.'" 200 Va. at 368. It is clear, then, that had Lynwood Chittum sustained the same disabling injury as a consequence of the negligence of an agent or employee of the United States, his gross income would have been reduced by the amount of his federal and state income taxes, but not by any railroad retirement taxes. There is certainly no reason why Norfolk and Western should benefit by a reduction of Chittum's gross income loss by the amount of railroad retirement contributions he would have made, when in a similar case brought under the Federal Tort Claims Act, the United States would not be entitled to a deduction from gross income for those amounts.

When this Court considers the fundamental difference between the entire statutory scheme of cases decided under the Longshore and Harbor Workers'

Compensation Act, and the situation involving a permanently disabled railroad employee making his claim under the Federal Employers' Liability Act, it is clear that the Railroad should not be permitted to deduct the employee's railroad retirement payments from his gross income for purposes of determining his total economic loss. The cases cited by Norfolk and Western simply have no relationship to the injured railroader whose pension will never reach the level it would have, had he not been injured.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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November 8, 1996

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